

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SHANE ANTHONY BROWNING,

Defendant-Appellant.

UNPUBLISHED

May 19, 2009

No. 282689

Ingham Circuit Court

LC No. 07-000219-FC

Before: K. F. Kelly, P.J., and Cavanagh and Beckering, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree premeditated murder, MCL 750.316(1)(a), and sentenced as an habitual offender, MCL 769.11, to life imprisonment without the possibility of parole. He appeals as of right. We affirm defendant's conviction and sentence, but vacate the portion of the judgment requiring defendant to pay attorney fees of \$500 and remand for further proceedings.

Defendant's conviction arises from the January 5, 2007, stabbing death of Deandre Hudson. Testimony indicated that defendant confronted Hudson when Hudson attempted to collect a drug debt from defendant's friend, James Edwards. Edwards and another witness, Basim Alsaedi, both testified that defendant began fighting with Hudson, who did not fight back. Hudson was stabbed five times and died from his wounds.

I. Prior Bad Act

Defendant argues that evidence of his collection of a drug debt earlier in the evening on the night of the offense was improperly admitted under MRE 404(b)(1). A trial court's decision to admit evidence is reviewed for an abuse of discretion. *People v McGhee*, 268 Mich App 600, 609; 709 NW2d 595 (2005).

The record indicates that the trial court determined that the evidence was admissible as res gestae evidence, independent of MRE 404(b)(1). Defendant does not challenge the trial court's ruling that the evidence was admissible as part of the res gestae of the charged offense. See *People v Sholl*, 453 Mich 730, 741-742; 556 NW2d 851 (1996). Because this serves as an independent ground for admitting the evidence, and defendant does not address this basis for

admission, appellate relief is not warranted. *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 381; 689 NW2d 145 (2004).

In any event, the trial court did not abuse its discretion in allowing the evidence as part of the res gestae of the charged offense. As the Supreme Court explained in *Sholl, supra* at 742:

It is the nature of things that an event often does not occur singly and independently, isolated from all others, but, instead, is connected with some antecedent event from which the fact or event in question follows as an effect from a cause. When such is the case and the antecedent event incidentally involves the commission of another crime, the principle that the jury is entitled to hear the “complete story” ordinarily supports the admission of such evidence.

Stated differently:

“Evidence of other criminal acts is admissible when so blended or connected with the crime of which defendant is accused that proof of one incidentally involves the other or explains the circumstances of the crime.”
[Citations omitted.]

The challenged evidence showed that defendant collected a drug debt earlier in the evening, during which he was aggressive and angry. This state of mind carried over to the time of the charged offense, just hours later, and helped explain why defendant would attack the victim, unprovoked. It also established his familiarity with drug debt collection, the same act that occurred between Edwards and the victim. Further, there was an acute temporal connection between the prior act and the charged offense. Thus, the evidence was admissible as part of the res gestae of the charged offense, independent of MRE 404(b)(1). In addition, any danger of unfair prejudice under MRE 403 was mitigated by the trial court’s cautionary instruction advising the jury of the limited purpose of the evidence, that the evidence was not to be considered to show that defendant is a bad person, and that the jury was not to convict defendant because he may be guilty of other bad conduct. For these reasons, we reject this claim of error.

II. Destruction of Evidence and Adverse Inference Instruction

Relying on *Arizona v Youngblood*, 488 US 51; 109 S Ct 333; 102 L Ed 2d 281 (1988), defendant argues that his due process rights were violated when a knife discovered by the police was discarded before he had an opportunity to examine it. Because defendant did not raise any due process issue below challenging the destruction or failure to preserve the knife, this issue is unpreserved. We review unpreserved claims of error for plain error affecting a defendant’s substantial rights. *People v Knox*, 469 Mich 502, 508; 674 NW2d 366 (2004).

The loss of evidence of unknown probative value, which is thus only potentially exculpatory, denies a defendant due process only when the police act in bad faith. *Youngblood, supra* at 57-58; *People v Hanks*, 276 Mich App 91, 95; 740 NW2d 530 (2007). In this case, Alsaedi testified that after the offense, he threw the knife that defendant used to kill Hudson outside a car window. The police later recovered a knife from the ground, but it was not found in the same area where Alsaedi said he discarded the knife used by defendant. The recovered knife was shown to Alsaedi, who stated that it was not the weapon he discarded. Nevertheless,

the police submitted the knife for examination. Testing revealed no evidence of blood or fingerprints, and there was a layer of dirt or dust that led the analyzer to believe that the knife had been in its discovered location for some time.

Because the recovered weapon was not found at the same location where the knife allegedly used to commit the offense was reported to have been discarded, the witness who discarded the knife informed the police that the recovered knife was not the same weapon, and testing of the recovered knife indicated that it did not contain anything of evidentiary value, but rather contained a layer of dirt suggesting that it had been at its discovered location for some time, there is no basis for concluding that the police acted in bad faith in failing to preserve this evidence. Thus, defendant has failed to show a due process violation.

Further, because the police did not act in bad faith, the trial court did not err in denying defendant's request for an adverse inference instruction based on the discarded knife. *People v Cress*, 250 Mich App 110, 158; 645 NW2d 669 (2002), rev'd on other grounds 468 NW2d 678 (2003).

III. Defendant's Standard 4 Brief

Defendant raises several issues in a pro se supplemental brief, filed pursuant to Supreme Court Administrative Order No. 2004-4, Standard 4.

A. Witness Production

Defendant first argues that he was denied a fair trial when the prosecutor failed to produce Rufus Robertson as a witness. He also argues that trial counsel was ineffective for failing to either compel Robertson's production or request a missing witness instruction, CJI2d 5.12, based on his nonproduction.

Prosecutorial misconduct issues are decided on a case-by-case basis. *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002). Shortly after the offense, Robertson gave a statement to the police in which he stated that when he stepped out of the house after the victim fell against the door, he saw a white male wearing an orange hat and a blue coat with striped sleeves get into the passenger side of a car.

MCL 767.40a(3) provides that "[n]ot less than 30 days before the trial, the prosecuting attorney shall send to the defendant or his or her attorney a list of the witnesses the prosecuting attorney intends to produce at trial." Assuming that Robertson was an endorsed witness,¹ the prosecution had a duty to exercise due diligence to produce him at trial. *People v Eccles*, 260 Mich App 379, 388; 677 NW2d 76 (2004). However, the prosecution could delete Robertson from its list of witnesses at any time upon leave of the court and for good cause shown or by stipulation of the parties. MCL 767.40a(4). Use of the missing witness instruction, CJI2d 5.12, may be appropriate when the prosecution fails to produce an endorsed witness who has not been properly excused. *People v Perez*, 469 Mich 415, 420; 670 NW2d 655 (2003).

¹ The prosecution did not specifically endorse any witnesses on its list.

Because defendant did not object to the failure to produce Robertson at trial, it is unclear whether Robertson was not properly excused or could not be produced despite the exercise of due diligence. Therefore, defendant has not established a plain error. See *Knox, supra* at 508. Furthermore, defendant has not provided any affidavit from Robertson indicating what his trial testimony would have been. Therefore, defendant's corresponding ineffective assistance of counsel claim also fails. There is nothing in the record to indicate that trial counsel would have been justified in moving to compel Robertson's production or requesting a missing witness instruction. See *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005).

B. MRE 404(b) Evidence

Defendant also argues that the prosecutor committed misconduct by filing a late notice of intent to introduce MRE 404(b) evidence. MRE 404(b)(2) provides, in pertinent part:

The prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses the pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial and the rationale, whether or not mentioned in subparagraph (b)(1), for admitting the evidence. . . .

The purpose of this rule is to "prevent[] unfair surprise and offer[] the defense the opportunity to marshal arguments regarding both relevancy and unfair prejudice." *People v VanderVliet*, 444 Mich 52, 89 n 51; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994).

On the first day of testimony, the prosecutor filed a notice of intent to introduce evidence of prior drug transactions between defendant and Edwards. The prosecutor admitted she had no reason for not filing the notice sooner, but explained that she had spoken to defense counsel about the matter several weeks before, a statement defense counsel did not challenge. Although defendant now claims that had he known of the prosecutor's intent to introduce this evidence sooner he would have presented evidence that Edwards, not defendant, was the drug dealer, he did not make this argument below and offers no support for this assertion. Therefore, defendant has failed to show that the late notice affected his substantial rights. See *People v Hawkins*, 245 Mich App 439, 453-456; 628 NW2d 105 (2001).

C. False Testimony

Defendant argues that Kenneth Brown falsely testified that he did not receive consideration for his testimony, and that the prosecutor engaged in misconduct by failing to correct this false testimony. A prosecutor has a duty to correct false testimony from a state witness when it arises. *People v Lester*, 232 Mich App 262, 276; 591 NW2d 267 (1998). Here, however, defendant has not established that Brown's testimony was false. At trial, Brown admitted that he received a reduction in his sentence, but stated that the reduction was because of his trustee status, not because of his testimony in this case. Brown received the sentence reduction before he testified at defendant's trial. Because defendant has not established that Brown's testimony was false, there is no basis for concluding that the prosecutor had a duty to correct his testimony.

D. Admission of Photographs

Defendant next argues that the prosecutor committed misconduct by introducing six autopsy photographs, each of which depicted one of the victim's stab wounds.

Photographs are admissible if substantially necessary or instructive to show material facts or conditions. If photographs are otherwise admissible for a proper purpose, they are not rendered inadmissible merely because they vividly portray the details of a gruesome or shocking accident or crime, even though they may tend to arouse the passion or prejudice of the jurors. [*People v Hoffman*, 205 Mich App 1, 18; 518 NW2d 817 (1994) (citations omitted).]

Autopsy photographs are relevant where they are instructive in depicting the nature and extent of the victim's injuries. *People v Flowers*, 222 Mich App 732, 736; 565 NW2d 12 (1997). Also, photographs may be admitted as evidence to corroborate a witness' testimony. *People v Unger (On Remand)*, 278 Mich App 210, 257; 749 NW2d 272 (2008).

Here, the photographs were relevant to illustrate the medical examiner's testimony regarding the victim's wounds. They also established defendant's intent by showing the placement and nature of the wounds. Further, "[t]he mere fact that defendant did not contest the nature of the fatal wounds or the physical circumstances of the shooting does not render inadmissible evidence regarding these matters." *People v Schmitz*, 231 Mich App 521, 534; 586 NW2d 766 (1998), overruled in part on other grounds by *People v Bell*, 473 Mich 275; 702 NW2d 128 (2005). The photographs depicted relatively clean stab wounds and, while graphic, were not inflammatory. Otherwise admissible evidence is not rendered inadmissible simply because of its graphic nature. *Unger, supra* at 257. Accordingly, defendant has failed to show plain error.

Defendant also argues that the prosecutor committed misconduct when she introduced a photograph of defendant handcuffed to a chair. Defense counsel stated that he had no objection to the admission of this photograph. Therefore, defendant waived his right to appellate review of this claim. See *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000).

E. Attorney Fees

Defendant argues that the trial court improperly ordered him to repay attorney fees of \$500 without first considering his ability to pay. We agree. A trial court is not required to make a specific finding on a defendant's ability to pay, but it must give some indication that it considered the defendant's ability to pay. *People v Dunbar*, 264 Mich App 240, 254; 690 NW2d 476 (2004). The amount ordered to be reimbursed should bear a relation to the defendant's foreseeable ability to pay. A defendant's apparent inability to pay at the time of sentencing is not necessarily indicative of the propriety of requiring reimbursement because a defendant's capacity for future earnings may also be considered. *Id.* at 255. There is no indication in the record that the trial court considered defendant's ability to pay. Although defendant did not object below, this constitutes a plain error affecting defendant's substantial rights. *Id.*

Accordingly, we vacate the trial court's order for reimbursement of attorney fees and remand for reconsideration of that issue in light of defendant's current and future financial circumstances. Contrary to what defendant asserts, if attorney fees are imposed on remand, they properly may be ordered in the judgment of sentence. MCL 769.1k(1)(b)(iii).

We affirm defendant's conviction and sentence, but vacate the trial court's order for reimbursement of attorney fees and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly

/s/ Mark J. Cavanagh